July 21, 2004

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	James F. Ray
Date of Filing:	June 9, 2004
Case Number:	TFA-0063

On June 9, 2004, James F. Ray filed an Appeal from a determination the Office of Security of the Department of Energy (SO) issued on May 4, 2004. The determination responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004.

I. *Background*

In a December 2, 2003 FOIA request, Mr. Ray sought from SO all documents related to the delegation of classification and declassification authority to a particular contractor employee who works in the DOE's Germantown, Maryland headquarters.

On May 4, 2004, SO issued a determination to Mr. Ray, in which it released 14 documents responsive to his request. SO withheld information from two of the documents, citing FOIA Exemption 6. Letter from Marshall O. Combs, Director, SO, to James F. Ray (May 4, 2004) (Determination Letter). In his appeal, Mr. Ray states that he is

> aware of email messages and other documents that are responsive but were not included in the initial FOIA response. I request the Department initiate a more thorough search for these responsive documents. I also believe that Exemption 6 of the FOIA . . . was incorrectly applied to the deletion and withholding of information in the documentation received . . . .

Appeal at 1.[1]

[1]Mr. Ray also proposed "that all correspondence relating to the initial FOIA request should be included as responsive documentation to the FOIA." First, Mr. Ray may not expand the scope of his request on appeal to this office. Second, the FOIA requires agencies to provide responsive documents that existed at the time of the agency's receipt of the request. It does not require an agency to create documents, nor to provide to the requester whatever documents it does create in the process of responding to the request. Mr. Ray may file a new FOIA request for the documentation he

II. *Analysis*

A. *Adequacy of Search for Responsive Documents*

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984).

SO provided us with the following information regarding its search. SO's point of contact forwarded Mr. Ray's request to ten individuals with whom documents responsive to the request might be found. Each was asked to provide responsive documents and was advised that "a negative reply is required" from individuals who did not locate responsive documents. All the recipients of the request either provided responsive documents to the point of contact or gave a negative reply. The point of contact also searched for responsive documents. Electronic Mail from Cecelia Rogers, SO, to Steven Goering, OHA (June 17, 2004).

In reviewing Mr. Ray's appeal, we asked him if he could provide more details regarding "email messages and other documents that are responsive but were not included in the initial FOIA response." Mr. Ray responded by referring to portions of the documents released to him, claiming that they refer to other documents that were not provided to him. In addition, he refers to representations made to him by certain people that certain documents exist. Finally, he refers to documents that should exist if "standard procedure" were followed, noting, "I am intimately familiar with the procedures that result in the granting of authorities. If they didn't follow these procedures they should explain why."[2] Electronic mail from James Ray to Steven Goering, OHA (July 7, 2004).

Mr. Ray helpfully names a number of specific individuals who would have created or received the documents that he believes should exist but were not provided to him. However, with only one exception, each individual identified by Mr. Ray was a recipient of his FOIA request, as forwarded by the SO point of contact. Each provided responsive documents to the point of contact, or indicated that no responsive documents were found. Regarding the one person mentioned by Mr. Ray, but who was not a recipient of the request, we asked if SO would be willing to forward the request to this person during the pendancy of this appeal. SO did so, and received a negative response. Electronic Mail from Cecelia Rogers, SO, to Steven Goering, OHA (June 17, 2004).

The appellant notes a number of reasons why additional responsive documents *should* exist. However, in cases such as these, "[t]he issue is *not* whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684

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seeks. *See Barbara Schwarz*, 28 DOE ¶ 80,199 at 80,715 (2001) .

[2] The FOIA does not require an agency to "explain" why it did or did not follow particular procedures related to the subject of a request.

F.2d 121, 128 (D.C. Cir. 1982) (emphasis in original). We note that the SO point of contact directed Mr. Ray's request to each person who it was reasonably believed might have responsive documents (and, more recently, to an additional person named by Mr. Ray), and that the names of these individuals matched exactly those identified by Mr. Ray as those who would have created or received documents responsive to his request. Based on the above, we find that SO's search was reasonably calculated to uncover the records Mr. Ray requested.

B. *Application of Exemption 6 to Information Withheld from the Requester*

Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6); 10 C.F.R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982). In order to determine whether a record may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to Exemption 6. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the Government. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*); *Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991); *FLRA v. Department of Treasury Fin. Management Serv.*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in disclosure in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-70.

In its August 22 determination, DOE/HQ withheld information from two documents, which it described as

> 'Person Detail' print-outs concerning [the contractor employee] from the Authorities and Training Tracking System (ATTS). The deleted information is test scores . . .
>
> . . . .
>
> We have determined that disclosure of the test scores for [the contractor employee] could subject him to unwanted communications or other personal intrusions. We have also determined that disclosure of the test scores will not reveal any aspect of the operations and activities of government.

Determination Letter at 1.

Mr. Ray takes issue with the finding of SO as to both the public interest and privacy concerns.

> I believe it is clearly in the public interest that anyone charged with protecting National Security Information verify their competency. . . , this is a question of National Security.
>
> These scores contain no personal information, in the generally accepted meaning of the term (i.e. there is no social security number, medical information, home address, race, religion, national origin, etc.). [The contractor employee] was granted full classification/declassification authority by the memo: J. Hawthorne to F. Willingham, dated September 29, 2003. The directions in the Request For Authority state that he must have demonstrated competence in the subject area(s), and have successfully completed a training program and passed an examination. The scores merely verify what the Agency and [the contractor employee] claim to be true, what is left to exempt?

Electronic mail from James Ray to Steven Goering, OHA (July 7, 2004).

First of all, we agree with SO that there are legitimate privacy concerns that would be raised by release of the test scores in question. Regardless of whether the individual's scores in this case were low or high, the release of such scores still touches upon a privacy interest of the individual--either based on embarassment or stigma resulting from the release, to the extent the scores are low, or because the scores "may well embarrass an individual or incite jealousy" among co-workers, to the extent the scores are high. *Ripskis v. HUD*, 746 F.2d at 3.

Regarding how release would further the public interest, Mr. Ray states that "it is clearly in the public interest that anyone charged with protecting National Security Information verify their competency." We generally agree with this point. However, in the present case, information already released to the requester *does* verify the qualifications of the contractor employee in question for the classification and declassification authorities granted to him. As Mr. Ray himself notes, the individual was granted classification and declassification authorities by a September 29, 2003 memo from the SO's Director of Information Classification and Control Policy Security, Security Policy Staff, which memo was among the documents released in their entirety to Mr. Ray. This memo clearly states that the individual in question "has satisfied the requirements of Department of Energy Manual 475.1-1A, 'Identifying Classified Information,' and is hereby granted the authorities specified in the attached descriptions."

Mr. Ray does not appear to be convinced by the statements in the memo, arguing that release of the individual's actual test scores would "merely verify what the Agency and [the contractor employee] claim to be true." However, Mr. Ray offers no reason why the plain text of the September 29 memo is not to be believed.[3] The information already available to Mr. Ray and the public is more than sufficient to verify that the individual passed the tests required to undertake the authorities granted to him.

[3]Moreover, SO has informed us that a passing score on the required tests in question was 80%. And without revealing the individual's actual test scores, we can confirm that the scores withheld from the requester do verify that the individual scored 80% or higher on each required test. One of the test scores withheld was, according to the document containing the scores, for a "[c]ourse taken for information only." Release of this score would not advance any public interest, since it would reveal nothing regarding whether the individual met the requirements for the authorities he was granted.

Weighing the privacy interests at stake on one hand, and the negligible public interest on the other, we conclude that Exemption 6 was properly applied in withholding test scores from the requester.

III. *Conclusion*

For the above stated reasons, we find that SO's search for documents in response to Mr. Ray's request was adequate for purposes of the FOIA, and that SO properly withheld information from the requester under FOIA Exemption 6. Thus, the present appeal will be denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by James F. Ray on June 9, 2004, OHA Case Number TFA-0063, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 21, 2004